92-1805

Supreme Court, U.S.
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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

ROBERTO PUENTE, JR.,
Petitioner

v.

THE UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Can the government sustain its burden of proving the materiality of a statement under United States v. Takington, CA Cal. 78, 589 F.2d 415, and United States v. Diaz, 690 F.2d 1352 (11th Cir. 1982), when no evidence is presented as to the materiality of the statement made to the government agency, and the government witnesses have testified that they were aware of the false statement, and that it had absolutely no bearing or consequence on their function as a government agency?

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TO THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

To The Honorable Chief Justice And Associate Justices Of The Supreme Court Of The United States:

The Petitioner Roberto Puente, Jr. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on January 21, 1993.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit on original submission of the cause appears in Appendix A herein.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered and delivered on January 21, 1993. This petition was filed within ninety days of that date. This court's jurisdiction is invoked under Supreme Court Rule 10.1(a), because the United States Court of Appeals in this case has rendered a decision in conflict with a decision of another United States Court of Appeals regarding the same matter.

STATEMENT OF THE CASE

Appellant, Roberto Puente, Jr., was charged, along with his father, in a

single count indictment with a violation 18 U.S.C. 1001, stating that he willfully and knowingly did make, and cause to be made, a false statement and representation as to a material fact in a matter within the jurisdiction of the United States Department of Housing and Urban Development. The purported statement was a representation on a construction contract that each of the defendants have not been convicted of a crime punishable by more than one year in prison. Appellants do not dispute the fact that each was given a probated sentence for a felony conviction previous to signing the form in issue.

On August 13, 1991 both Appellants went to trial before the Court, non-jury. Roberto Puente, Sr. was acquitted, and Roberto Puente, Jr. was convicted and sentenced to three years probation and a

$5,000.00 fine, from which conviction the Appellant, Roberto Puente, Jr. appealed to the United States Court of Appeals for the Fifth Circuit.

On January 21, 1993, the United States Court of Appeals for the Fifth Circuit affirmed the district court's judgment.

Roberto Puente, Sr., Robert Puente, Jr., and Ruben Puente were Officers of a corporation titled Eagle Contractors, Inc. Juan Benavides was an employee of that Corporation (Tape No. 1; 8/13/91; 9:45:30; 2:41:20).

On or before July 12, 1990, Eagle Contractors Inc. bid on a housing project in Eagle Pass Texas that was in part funded by the Department of Housing and Urban Development (Tape No. 1; 8/13/91; 9:43:24). Bidding procedure required that

the parties fill out a previous participation form (Tape No. 1; 8/13/91; 9:50:24) that documented several facts concerning their prior participation with the Federal Government on building projects, and additionally asks the question whether or not any individuals signing the document had been previously convicted of a felony offense (Tape No. 1; 8/13/91; 10:05:15). Their bid, for 39 dwelling units of the Thompson Addition, was opened on July 12, 1990 and was the low bid (Tape No. 1; 8/13/91; 9:51:14). On July 24, 1990 a board meeting was held, publicly, for the recommendations of acceptance. At that meeting, John Melton who was in charge of the project for HUD, recommended that the bid of Eagle Contractor be accepted (Tape No. 1; 8/13/91; 9:50:15). Mr. Melton was informed that Roberto Puente, Jr. and Sr.

were convicted felons. After John Melton, of HUD, investigated the allegations and even procured documents evidencing that each defendant had been previously convicted of a felony and placed on probation out the of Cities of Eagle Pass and Laredo, Texas, he provided that information to his legal counsel for HUD (Tape No. 1; 8/13/91; 10:04:21; 10:06:24; 10:19:02). They then decided to set up a meeting and bring the Puente's back into their office and have them sign the larger regular size form which they had not yet been provided with. Without telling the Puentes that anything was out of the ordinary, Mr. Melton asked if they had read the form and were willing to sign it again (Tape No. 1; 8/13/91; 10:19:02). After the Puentes reacknowledged the form that they had previously signed (in a

smaller copy) the HUD officials rejected their bid and accepted the number two bid (Tape No. 1; 8/13/91; 10:15:34).

It should be noted that Mr. Melton recommended Eagle Contractors to the decision making authorities, and he continued with that recommendation after discovering that they have prior felony convictions, and even after they resubmitted the enlarged form and resigned it. Both times, and throughout every date in this scenario, Mr. Melton believed that Eagle Contractors deserved the bid, and he personally wanted them to get the contract (Tape No. 1; 8/13/91; 10:29;08; 11:14:46). The facts are undisputed that no individual ever witnessed Roberto Puente, Jr. reading the form. Additionally, the facts are clear that Juan Benavides actually filled out the form and that he used

information from forms that had been previously filled out, and that did not require anyone acknowledge their prior criminal record (Tape No. 1; 8/13/91; 2:41:20; 2:45:15; 2:50:22).

REASONS FOR GRANTING WRIT

Appellant contends that one of the essential elements in this case is that the false representation be one of a material nature. The statute and the indictment that track it, both required the requisite of materiality be satisfied. In this case it was not. The prosecution's own witnesses testified that: 1) The fact that an individual is or is not a previously convicted felon is not a deciding factor as to whether or not the bid will be accepted; 2) That an individual's bid can and will be accepted even through one

of the corporate officers might be a convicted felon, provided there is an explanation given in the explanation blank of the document; 3) Each of the prosecution witnesses admitted that that particular statement of fact would not have caused them to reject the Eagle Contractors bid; 4) John Milton emphatically and zealously testified that he would recommend Eagle Contractors after they had signed and submitted the document that he believed to be false, even after he had discovered they had prior criminal records, as well as before he was aware of any of that information. The record itself is devoid of any evidence that the statement was material or of a material nature, and the testimony indicates it was otherwise.

Robert Puente, Jr. was charged with a violation of 18 U.S.C. 1001 describing his

offense in the indictment as being one in which he willfully and knowingly did make and cause to be made a false statement and representation as to a material fact in a matter within the jurisdiction of the United States Department of Housing and Urban Development. Pertinent parts of that statute are incorporated into the indictment and the claim is made that the Appellant represented on a contract that he (and his father Roberto Puente, Sr.) had not before been convicted of a crime punishable by more than one year in prison. Evidence showed that the statement or purported misrepresentation was included in Exhibit 2, entitled a "previous participation" document. The previous participation document is a document that describes the bid parties' prior contact with government building contracts, and

includes a request to indicate whether or not the individuals signing that document have previously been convicted of a felony offense. Appellant signed the document but did not indicate that he had been convicted of a prior felony. The burden is on the prosecution to prove beyond a reasonable doubt each and every element of the indictment, and it is necessary under this statute for the prosecution to prove that the representation made was to a material fact. However, the evidence in this case is devoid of any proof that the fact that Appellant had been "previously convicted of a felony" was material to the issue at all.

If anything, the evidence showed that it was not only immaterial, but that it would not have been a factor whatsoever.

The HUD representative, John Melton,

testified not only that a bidder can still get the contract if he has been convicted of a prior felony, but he additionally stated that in this case he recommended Eagle Contractors to get the bid (Tape No. 1; 8/13/91; 10:29:08). He continued to recommend Eagle Contractors after finding out that even though the form indicated Robert Puente, Jr., Appellant, had not been convicted of a felony, and that Robert Puente, Jr. actually had a prior felony conviction. Mr. Melton testified under oath that he never withdrew or changed that recommendation that Eagle Contractors should get the contract (Tape No. 1; 8/13/91; 11:14:46).

It is also important to note that Mr. Melton as well and the architect, Mr. Ron Bardutti never considered the fact that a bidder had a prior felony conviction to be

an obstacle to getting the contract. They each indicated that if the bidder was a corporation, and the signatory on the previous participation document had been convicted of a felony, that at the very most they would request come type of explanation (Tape No. 1; 8/13/91; 10:10:33; 10:54:49; 11:45:73). In this case however, they did not feel that that was enough of a factor to enter into their bid recommendation. Appellant submits that is tantamount to an agreement that the issue was not material to the bid process. The elements of this particular offense have been delineated as follows:

1. That the Defendant made a statement;
2. It was false or fraudulent;
3. The Defendant knew the statement was false;

4. That he made the statement knowingly and willfully;

5. That it is within the jurisdiction of a federal organization;

6. That it was material. United States v. Carrier, CA Idaho, 1981, 654 F.2d 559.

The materiality issue was discussed at length in United States v. Takington, CA Cal. 78, 589 F2d 415, in which the court indicated that the government bears the burden of proving the materiality of the false statement. In so doing the government's burden is only met if there is a showing that the statement itself was capable of influencing against the decision. In the present case its important to note that the falsity of the statement in issue would not have been a factor, or would it

have altered Mr. Melton's decision to recommend Eagle. It has been held that a misrepresentation that a commission of $7,500.00 was taken instead of the $15,000.00 that was actually taken, was "not material" even though the statement was false in an FDIC hearing for HUD. United States v. Kuriat, CA (Ill.) 1987, 817 F.2d 440.

An additional issue is present in this case. The testimony all but showed that a charge would not be brought based on the first, or smaller document, because the document was reduced and could be misconstrued or confusing (Tape No. 1; 8/13/91; 10:47:10; 10:16:22). Prior to the signing of the second and enlarged copy of the previous participation certificate, the Government Agent, Mr. Melton, knew of the statement's falsity (Tape No.

1; 8/13/92; 10:42:21; 10:6:24). He could not and did not rely on its materiality or its being a factor in that he continued to recommend Eagle after the document marked Government Exhibit 3 was signed. In United States v. Jarvis, S.D. Cal 1987, 653 F. Supp. 1396, the Court indicated that if statements are made when the individual responds to questions by Federal Authorities that could possibly incriminate that individual and where the acts by the government are not the routine exercise of administrative responsibility, and the statement didn't impair the basic function of the organization, then the statements would not support a conviction.

The immateriality of this statement is almost a foregone conclusion, in that, bringing the Appellant and his father back into the office to re-sign the larger

previous participation certification was admittedly not an exercise of administrative responsibility, but an attempt to clear the air and see if the Appellant would explain his response. The test was set out in United States v. Carrier, Supra, in which the Court stated that the determination of materiality must be whether the false statement could affect or influence government function, and whether it would have a natural tendency to influence or is otherwise capable of influencing government action. This statement on Exhibit 3 could not influence government action for 2 reasons: 1) The Government Agents were already aware that the statement was false prior to the signing in their presence. 2) They admitted they were not influenced by the statement and still recommended Eagle for the cont-

ract. See also United States v. D. Fonzo, CA. Ill. 602 F.2d 1260 1979 (cert.denied).

The Fifth Circuit Court of Appeals relied upon United States v. Swaim, 751 F.2d 1530, 1534 (5th Cir.) cert. denied, and United States v. Diaz, 690 F.2d 1352, holding that the statement may be material "even if it is ignored or never read by the agency receiving the misstatement." It only needs to be capable of affecting or influencing a government agency.

Appellant submits that this is a misconstruction of the applicable law and in conflict with other appellate courts. For example, United States v. Takington, CA Cal. 78, 589 F.2d 415, concurs with the rationale, but astutely indicates that the government bears the burden of proving the materiality, and must therefore show that the statement was capable of influencing

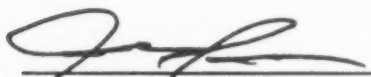
the decision.

When the government makes no attempt to show the statement was "capable of influencing" and actually proves it did not, would not, and could not influence, the Appellate Court should not substitute its judgment or beliefs for those of the actual HUD witnesses. The Court of Appeals should not decide that a statement was capable of influencing an agency, when the agency has indicated it was not so capable.

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,



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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-8084

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ROBERTO PUENTE, JR.,

Defendant-Appellant.

Appeal from the United States District Court for the Western District of Texas

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Judgment rendered January 21, 1993

Before KING, JOHNSON, and DUHÉ, Circuit Judges.

JOHNSON, Circuit Judge:

Following a bench trial, Roberto Puente, Jr. was convicted of making a false statement to a government agency in violation of 18 U.S.C. § 1001. Puente raises two arguments on appeal. Puente

argues first that the government did not carry its burden of proving the elements of a § 1001 violation, and second that his conduct fell within the "exculpatory no" exception to § 1001. Finding no error, this Court affirms the judgment of the district court.

I. Facts and Procedural History

Puente and his father were two of the principal officers of Eagle Contractors, Inc. In their capacity as company officers, they submitted a bid on the renovation of a housing project in Eagle Pass, Texas. The project was partially administered and funded by the U.S. Department of Housing and Urban Development (HUD). The bidding process required that the parties fill out a "Prior Participation Certification" form documenting their prior in-

volvement with federal building projects. By signing this form, the parties also certified that they had never been convicted of a felony. Puente and his father both signed the form despite the fact that each had a previous felony conviction.

At a public board meeting held for the purpose of recommending acceptance of a bid, John Melton, who was in charge of the project for HUD, recommended that Eagle Contractors be awarded the project. Melton was then informed of the Puentes' felony convictions by another board member. Melton later investigated this allegation and obtained documentation confirming that both Puente and his father had previously been convicted of a felony. However, there is no HUD rule that prohibits convicted felons from being awarded government contracts, and Melton

continued to recommend that Eagle Contractors be awarded the contract.

Though Melton still favored Eagle Construction, he provided the information concerning the Puentes' misrepresentations to the legal counsel for HUD. After a review of the documents submitted by the Puentes, HUD officials determined that Puente and his father had actually signed a reduced copy of the previous participation form that had been provided in the project manual.[1] This form was very difficult to read, and HUD officials recognized that Puente and his father might have misunderstood the certification requirements. Melton was instructed to give the Puentes a chance to sign the full-size form at a preconstruction meeting. Without mention-

[1]The actual HUD form measures 11 x 14 inches. The form included in the project manual had been reduced to 8.5 x 11 inches.

ing his investigations or specifically pointing out the certification requirement, Melton asked the Puentes if they had read the form and were willing to sign. After they signed the form, HUD officials rejected their bid and awarded the project to the number two bidder.

Puente and his father were subsequently charged with violating 18 U.S.C. § 1001 which makes it a crime to knowingly and willfully misrepresent a material fact in a matter within the jurisdiction of a department or agency of the United States. Following a bench trial, Puente was convicted, and his father was acquitted. Puente now appeals.

II. Discussion

A. Sufficiency of the Evidence

A violation of 18 U.S.C. § 1001 requires five elements: "(1) a statement,

that is (2) false (3) and material, (4) made with the requisite specific intent, [and] (5) within the purview of government agency jurisdiction." United States v. Lichenstein, 610 F.2d 1272, 1276 (5th Cir.), cert. denied, 447 U.S. 907 (1980). Puente argues that the prosecution did not satisfy its burden of proof for two of these elements--specifically materiality and intent.

In reviewing the sufficiency of evidence for a bench trial, this Court applies a substantial evidence standard. United States v. Jennings, 726 F.2d 189, 190 (5th Cir. 1984). The question before this Court is whether, when viewing the evidence in the light most favorable to the government, the evidence is sufficient to justify the trial judge, as trier of the facts, in concluding beyond a

reasonable doubt that the defendant was guilty. United States v. Richardson, 848 F.2d 509, 511 (5th Cir. 1988).

1. Materiality

A material statement is one that has "a natural tendency to influence, or [one that is] capable of affecting or influencing, a government function." United States v. Swaim, 757 F.2d 1530, 1534 (5th Cir.), cert. denied, 474 U.S. 825 (1985). Actual influence or reliance by a government agency is not required. The statement may still be material "even if it is ignored or never read by the agency receiving the misstatement." Id. (quoting United States v. Diaz, 690 F.2d 1352, 1358 [11th Cir. 1982]).

Puente argues that his certification was not material because a bidder can still be awarded a contract even if he has

been convicted of a felony. Previous case law makes it clear, however, that the standard for a § 1001 violation is not whether the false statement actually influenced a government decision or even whether it probably influenced the decision; the standard is whether the misrepresentation was capable of influencing the agency decision. In this case, the stated purpose of the Previous Participation Certification is to allow HUD "to determine if [the bidder] meet[s] the standards established to ensure that all principal participants in HUD projects will honor their legal, financial and contractual obligations and are acceptable risks from the underwriting standpoint of an insurer, lender or government agency." By signing the Previous Participation Certificate, Puente provided HUD with information in a

number of areas that could be relevant to any agency decision on whether to approve a bidder's participation in a government project. In addition to certifying that he had never been convicted of a felony, Puente also certified that no mortgage on any of his previous projects had ever been in default; that there were no unresolved findings raised by government audits or investigations of his previous projects; that he had not been suspended or disbarred from doing business with any government agency; and that he had never defaulted on an obligation covered by a surety or performance bond. While it may be true that Puente would have been awarded the contract even if he had answered truthfully, his misrepresentation deprived HUD of the opportunity to determine, based upon all relevant information, which

bidder was best qualified to complete the job. Because HUD officials could have viewed the bid differently if Puente had answered correctly, the district court did not err in holding that Puente's misrepresentation was "capable of affecting or influencing" the agency decision.

2. Intent

A conviction under § 1001 requires proof that a defendant had the specific intent to make a false or fraudulent statement "deliberately or at least with reckless disregard of the truth and with the purpose to avoid learning the truth." United States v. Tamargo, 637 F.2d 346, 351 (5th Cir.), cert. denied, 454 U.S. 824 (1981). In this case, Puente claims that he never read the HUD form, and the prosecution introduced no evidence that showed that Puente knew what he was signing. In-

stead, the district court concluded that, by signing the form without reading it, Puente acted with "a reckless disregard of the truth and with the purpose to avoid learning the truth."

This Court finds no error in the district court's judgment. "Reckless indifference" has been held sufficient to satisfy § 1001's scienter requirement so that a defendant who deliberately avoids learning the truth cannot circumvent criminal sanctions. See United States v. Schaffer, 600 F.2d 1120, 1122 (5th Cir. 1979). Likewise, a defendant who deliberately avoids reading the form he is signing cannot avoid criminal sanctions for any false statements contained therein. Any other holding would write § 1001 completely out of existence.

B. The "Exculpatory No" Doctrine

Puente's final argument is that his false statement falls within the "exculpatory no" exception to liability under § 1001. The "exculpatory no" doctrine exempts "mere negative responses" to questions posed by investigating agents from the reach of § 1001. Paternostro v. United States, 311 F.2d 298, 305 (5th Cir. 1962); see also United States v. Berisha, 925 F.2d 791, 796 (5th Cir. 1991). The doctrine originates, at least in part, from a "latent distaste for an application of [§ 1001] that is uncomfortably close to the Fifth Amendment." United States v. Lambert, 501 F.2d 943, 946 n.4 (5th Cir. 1974) (en banc). Puente argues that his signature on the full-size form was exculpatory because he had already signed the reduced form; if he had refused to

sign the second form he would have incriminated himself by taking an inconsistent position.

Whatever the merits of this argument, Puente did not raise it before the district court. When reviewing a theory raised for the first time on appeal, this Court applies a "plain error" standard and only reverses errors of a nature that they would result in a miscarriage of justice if not remedied. United States v. Young, 470 U.S. 1, 15-16 (1985); United States v. Contreras, 950 F.2d 232, 239 (5th Cir. 1991), cert. denied, 112 S.Ct. 2276 (1992). Puente's "exculpatory no" argument simply does not rise to this level.

III. Conclusion

For the reasons stated, this Court holds that the evidence was sufficient to

sustain Puente's conviction for a violation of 18 U.S.C. § 1001. Also, we hold that it was not plain error for the district court to acquit Puente under the exculpatory no doctrine. Accordingly, the judgment of the district court is affirmed.